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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 966

THE HEARST CORPORATION, BALTIMORE NEWS AMERICAN DIVISION,

Petitioner,

v.

LOCAL UNION NO. 24, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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LOCAL UNION NO. 24, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, The Hearst Corporation, Baltimore News American Division, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled case on November 2, 1965.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 352 F. 2d 957 (1965), and is reprinted in the Appendix, p. 3a, *infra*. The opinion of the United States District Court for the District of Maryland is reported at 241 F. Supp. 853 (1965), and is reprinted in the Appendix, p. 8a, *infra*.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on November 2, 1965. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Where a collective bargaining agreement provides for the arbitration of "grievances", does the mere assertion by a labor union that it has a "grievance" against the employer, *ipso facto*, create an arbitrable issue which precludes further consideration by the court of whether an arbitrable issue exists?

STATUTE INVOLVED

The statute involved is Section 301 of the Labor Management Relations Act, 29 U.S.C. Section 185. The statute is set forth in the appendix, at p. 1a, infra.

STATEMENT OF FACTS

Petitioner is the publisher of the Baltimore News American, a daily newspaper in the Baltimore Metropolitan Area. On April 30, 1964, Petitioner's predecessor, Hearst Consolidated Publications, Inc., entered into a collective bargaining agreement (App. 4-10)[1] with Respondent, effective from and after May 4, 1964 and terminating on May 7, 1967[2] (App. 4-10).

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[1] The record references are to the Appendix to Appellant's Brief prepared for the United States Court of Appeals for the Fourth Circuit. We have filed nine copies of the Appellant's Brief and Appendix with the Petition.

[2] The agreement provides that if either party wishes to propose an amendment or a new agreement to become effective May 8, 1967, it shall so notify the other party sixty (60) days prior to such date, and accompany the notice with a statement of the changes desired.

Petitioner and The A. S. Abell Co., publishers of the Baltimore Sun, have a joint collective bargaining agreement with Baltimore Typographical Union No. 12 (Typographical Union) and a joint collective bargaining agreement with Truck Drivers and Helpers Local Union 355 (Teamsters Union). On April 17, 1965, the Washington Newspaper Guild Local 35, AFL-CIO (The Guild) began a strike against The A. S. Abell Co. and began picketing the Sun plant. Members of the Typographical Union and the Teamster's Union employed by The A. S. Abell Co. refused to cross the Guild picket lines and to report for work at the Sun plant (App. 17, 21-22).

On April 20, 1965, Petitioner sent to all of its employees a notice (Exhibit B, App. 10) advising them that the action of the Typographical and Teamster's Unions was a violation of the joint collective bargaining agreements with those unions and was a threat to the interest of Petitioner and The A. S. Abell Co. in bargaining on a group basis. The notice further advised Petitioner's employees that Petitioner was suspending publication temporarily and that there would be a period of time during which there would be no work to be performed by those employees not specifically requested to work. At the same time, Petitioner sent to certain maintenance and clerical employees, an additional communication (Exhibit E, App. 22) directing them to continue on their regular employment schedule. None of the six[3] members of Respondent employed by Petitioner, except the Chief Electrician, received the notice to continue on their regular employment schedule (App. 10-11, 17-21).

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[3] Respondent represents only six of Petitioner's 1100 employees, including the Chief Electrician, who, although a member of Respondent, is exempt from the terms of the collective bargaining agreement (App. 18-19).

On April 22, 1965, Respondent sent to Petitioner a written demand for arbitration of Petitioner's action in "locking out" Respondent's members (Exhibit C, App. 11). On April 22, 1965, Petitioner replied to Respondent's demand for arbitration by sending a telegram (Exhibit D, App. 12) to Respondent stating that Respondent had no labor dispute with Petitioner and that the arbitration provisions of the collective bargaining agreement were inapplicable. The telegram further stated that Petitioner had no work for members of Respondent because of breaches of contracts by the Typographical and Teamsters', Unions, but that Respondent's members would be promptly recalled when work was available (App. 11-12).

Respondent initiated this litigation in the United States District Court for the District of Maryland to compel arbitration under the collective bargaining agreement between the parties. The jurisdiction of the District Court was invoked under the provisions of Section 301 of the Labor Management Relations Act, 29 U.S.C. Section 185. After hearing testimony, the District Court denied Petitioner's motions to dismiss and ordered the parties to arbitration. The order of the District Court, *inter alia*, directed the parties to submit the issue of arbitrability to the arbitration board (App. 30).

The United States Court of Appeals for the Fourth Circuit affirmed the order of the District Court in an opinion filed on November 2, 1965.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals for the Fourth Circuit conflicts in principle with the decision of the Court of Appeals for the Seventh Circuit in *Independent Petroleum Workers v. American Oil Co.*, 324 F. 2d 903 (7 Cir. 1963), affirmed 379 U.S. 130 (1964), and with other decisions of this Court concerning compulsory arbitration.

The substance of the decision of the court below is that where one party to a collective bargaining agreement providing for the arbitration of "grievances" asserts that it has a "grievance" against the other, such an assertion *ipso facto* creates an arbitrable issue which precludes further consideration by the court of the existence *vel non* of such an issue.

The rationale of this holding would seem to be entirely inconsistent with the principles enunciated in *Independent Petroleum Workers v. American Oil Co.*, 324 F. 2d 903 (7 Cir. 1963), affirmed by an equally divided court in 379 U.S. 130 (1964).

In that case, the union sought compulsory arbitration of the employer's action in contracting out work. The collective bargaining agreement contained no provision concerning contracting out work. The arbitration clause provided for arbitration of "questions directly involving or arising from applications, interpretations or alleged violations of" the terms of the agreement. The union claimed only the right to arbitrate the employer's action as an alleged violation of the collective bargaining agreement. The Court of Appeals for the Seventh Circuit reversed the order of the District Court ordering arbitration and remanded the case with directions that the employer's mo-

tion for summary judgment be granted. The Court said at page 906:

> "Plaintiff in its brief states, 'This provision * * * of the grievance procedure simply states that a grievance matter which comes into existence because of the allegation of either party that the agreement has been violated is such a question as the parties have contractually bound themselves to arbitrate.' In other words, it is Plaintiff's position that the mere allegation that the agreement has been violated, ipso facto, entitles it to arbitration. This position, if accepted, means that either party by alleging a refusal of the other to bargain with respect to any conceivable issue or controversy would become subject to arbitration.
>
> "Plaintiff's position is devoid of all logic. It is without merit and we so hold. * * *"

In the instant case, the collective bargaining agreement provided for the arbitration of "grievances" arising out of and during the term of the agreement. The undisputed evidence showed that Petitioner had suspended operations because of a labor dispute with unions other than Respondent, and had notified its employees, including members of Respondent, that there would be no work for them to perform during the labor dispute with the other unions. No other conduct of Petitioner in asserted violation of the agreement was alleged or proven.[4] The collective bargaining agreement between the parties contained no provision binding Petitioner to provide any specified amount of work for its employees who are represented by Respondent and no provision against laying off Respondent's

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[4] In the Complaint, Respondent alleged that Petitioner and The A. S. Abell Co. had "illegally combined" for the purpose of forcing Respondent to bring pressure on certain labor organizations on strike at The A. S. Abell Co. This allegation was denied in the answer and was specifically abandoned by Respondent at the hearing before the District Court (App. 21).

members when there was no work for them to perform. There was no evidence that Petitioner "locked out" Respondent's members other than Respondent's bald assertion in the Complaint that its members had been "locked out". Relying solely on this assertion, without supporting evidence of any kind, the court below ruled that Petitioner was required to submit its case to the naked and unrestricted power of an arbitrator, without the benefit of jury trial, without the procedural safeguards extant in a court of law, and most importantly, without the right to judicial review except in the most limited sense of that term. The Court of Appeals, throughout its opinion, assumed that Respondent's assertion that its members had been "locked out" was sufficient to take the matter out of the court's hands, without further evidence or consideration of the facts of the case.

The decision of the Court below, besides conflicting in principle with the aforementioned decision of the Seventh Circuit, raises serious questions which are vital to the national labor-management relations policy. If the mere assertion by a union that it has a "grievance" is to raise an arbitrable issue and preclude the federal courts from any further consideration of the facts or nature of the controversy, regardless of the evidence or lack of evidence, the function of the courts in suits for compulsory arbitration under Section 301 will henceforth be limited to a reading of the complaint. Despite the clear preference of this Court for arbitration as a means of settling labor disputes, this Court has never stated or suggested that the function of the federal judiciary is to be so limited. To the contrary, from the Steelworkers' Trilogy[5] to the present, this Court

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[5] *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

has consistently taken the position that arbitrability is a question for the courts, to be determined on the basis of the contract between the parties. In *American Mfg. Co.* (concurring opinion of Mr. Justice Brennan), it is stated at page 570:

> "To be sure, since arbitration is a creature of contract, a court must always inquire, when a party seeks to invoke its aid to force a reluctant party to the arbitration table, whether the parties have agreed to arbitrate the particular dispute. In this sense, the question of whether a dispute is 'arbitrable' is inescapably for the court."

In *Warrior & Gulf Navigation Co.*, this Court said in footnote 7 on page 583:

> "It is clear that under both the agreement in this case and that involved in *American Manufacturing Co.*, ante, p. 564, the question of arbitrability is for the courts to decide. * * * *Where the assertion by the claimant is that the parties excluded from court determination not merely the decision of the merits of the grievance but also the question of its arbitrability, vesting power to make both decisions in the arbitrator, the claimant must bear the burden of a clear demonstration of that purpose.*" (Emphasis supplied.)

See also *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 546 (1964); *Drake Bakeries v. Local 50, American Bakery*, 370 U.S. 254, 256 (1962); and *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1962).

It is clear that the Court of Appeals for the Fourth Circuit has adopted the view, contrary to the decisions of this Court, that the question of arbitrability should be submitted to the arbitrator rather than decided by the court. In the instant case, the order of the District Court, affirmed on appeal, directed that the question of arbitrability be submitted to the arbitrator. Both the District Court and

the Court of Appeals refused to decide this question, despite the decisions of this Court that such question is a matter for judicial determination. This view of the Court of Appeals for the Fourth Circuit was clearly presaged in the case of *A. S. Abell Co. v. Baltimore Typographical Union No. 12,* 338 F. 2d 190 (4 Cir. 1964). While that decision is undoubtedly correct on the facts of that case, the language of the Court of Appeals clearly evinced the mistaken view that questions of arbitrability should be submitted to the arbitrator. Instead of deciding the case on the narrow basis that the dispute was arbitrable under the agreement, the Court chose to rest its decision on a much broader ground. The Court said at page 193:

> "* * * The rules announced by the Supreme Court * * * unmistakably encourage the resolution of disputes arising under collective bargaining agreements by arbitration rather than by the Court, including issues, such as we have here, as to whether a particular dispute is arbitrable under the terms of the agreement. * * *"

Likewise, the Court said at page 194:

> "* * * It is the Board of Arbitration who should make the determination of whether the controversy is subject to arbitration."

With all due respect to the learned court below, it is submitted that it is under a mistaken conception with respect to the function of the federal courts in suits for compulsory arbitration under Section 301. This conception is at odds with the holdings of the other lower federal courts and with the teachings of this Court. In the instant case, Petitioner was ordered to arbitrate its suspension of operations due to a labor dispute with other unions on the bald assertion of Respondent that it had a "grievance". Presumably, the result would have been the same what-

ever the outside influence causing the suspension of operations. In the interest of uniform national labor policy, the decision of the Court of Appeals for the Fourth Circuit should not be permitted to stand.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Statutory Provisions

Section 301 of the Labor Management Relations Act (29 U.S.C. Section 185) provides:

§185. Suits by and against labor organizations — Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Jurisdiction

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

Service of process

(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

Determination of question of agency

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling. June 23, 1947, c. 120, Title III, §301, 61 Stat. 156.

APPENDIX B

Opinion of the United States Court of Appeals for the Fourth Circuit

(Filed November 2, 1965)

Local Union No. 24, International Brotherhood of Electrical Workers, AFL-CIO,

v.

The Hearst Corporation, Baltimore News American Division.

Sobeloff, Boreman and Bryan,
Circuit Judges

SOBELOFF, Circuit Judge

The union brought suit in the District Court under section 301 of the Labor Management Relations Act, 29 U.S. C.A. §185, to compel arbitration. The District Judge denied the motion of the defendant newspaper to dismiss and ordered the parties to arbitrate pursuant to a collective bargaining agreement executed April 30, 1964.

The suit arises out of a notice sent by the publishers of the News American to members of the IBEW advising them that there would be no work for an indefinite period of time. A complete understanding of the case requires a brief statement of its factual background.

The News American and the Sunpapers are the two leading daily newspapers in Baltimore. On April 17, 1965, the Washington Newspaper Guild struck the Sunpapers after months of fruitless collective bargaining. Members of the International Typographical Union and Teamsters Union refused to cross the Guild's picket line, and as a result the Sunpapers was unable to continue operations and suspended publication.

The ITU and the Teamsters have joint collective bargaining agreements with the Sunpapers and the News American; the contract of the IBEW is with the News American alone. When the ITU and Teamsters refused to

cross the Guild picket line, with the resulting shutdown of the Sunpapers, the News American, which had not been struck, notified its employees that the action of the ITU and the Teamsters (with which the IBEW was in no way connected) violated the no-strike provisions of the joint contracts and threatened the integrity of the multi-employer bargaining unit. The News American further notified its employees that it was suspending publication temporarily and that for a period of time there would be no work for them.[1]

Upon learning of the News American's suspension notice, the plaintiff union requested arbitration of the company's right under these circumstances to lock out members of the IBEW. The News American denied the request.

The pertinent provisions of the collective bargaining agreement are as follows:

"ARTICLE IX — ARBITRATION

"It is agreed that in the event a grievance or misunderstanding arises out of and during the terms [sic] of this agreement, as provided for herein, that cannot be composed by the Union and the Publisher within a reasonable time, and which constitutes a matter subject to review, such grievance shall be submitted to arbitration. * * * [Either party may request that the grievance be submitted to arbitration.] There shall be no lockout by the Publisher or strike or stoppage of work by the employees pending the arbitration decision. It is agreed that any difference arising incident to negotiation of the terms of a new agreement are not covered by this section; the sole purpose of which is to make subject to arbitration grievances arising out of and during the terms [sic] of the agreement. * * *

"ARTICLE X — STRIKES AND LOCKOUTS

"* * * There shall be no stoppage of work, either by strike or lockout during the term of this agreement

[1] An additional notice was sent to certain maintenance and clerical employees, informing them that they should continue to report to work.

or disputes over matters relating to this agreement. All such matters must be handled as stated in Article IX herein."

The question presented to us is a very narrow one: Is the arbitration clause "susceptible of an interpretation that covers the asserted dispute? Doubts should be resolved in favor of coverage." *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 582-83 (1960); *A. S. Abell Co. v. Baltimore Typographical Union No. 12*, 338 F. 2d 190, 193 (4th Cir. 1964); *United Textile Workers of America, Local No. 120 v. Newberry Mills, Inc.*, 315 F. 2d 217, 218 (4th Cir. 1963).

No provision in the contract defines "grievance" or "misunderstanding" or limits those terms in any way. Either party may request that a grievance be submitted to arbitration. The only matter specifically excluded from the arbitration provision is a dispute "incident to negotiation of the terms of a new agreement." This court cannot say that the company's right to lock out members of the IBEW is a matter excluded from arbitration, for the contract in very broad terms provides that there shall be no strike or lockout during the term of the agreement and that all disputes relating to the agreement must be submitted to arbitration.

It is true, as the employer contends, that there was no dispute between the News American and the IBEW prior to the company's decision to lock out the union's members. It must be conceded, however, that a bona fide dispute did exist between the parties once the union communicated to the employer its strong feeling that the employer had no right under the contract to bar its members from their jobs.

The employer maintains that its letter to IBEW members telling them not to report for work did not constitute a "lockout." The employer cites several arbitration decisions to the effect that a lockout occurs only when an employer directs its employees not to report for work in order to gain a concession *from them*. *In Re Great Atlantic & Pacific Tea Co.*, 33 Lab. Arb. 502 (1959); *In Re Great Atlantic &*

Pacific Tea Co., 32 Lab. Arb. 838 (1959); *In Re Mrs. Conkling's Bakery*, 15 Lab. Arb. 168 (1950).[2] The union replies that this is too narrow a view of the term "lockout" as used in the agreement. It insists that when unoffending employees are told not to report for work because the employer voluntarily suspends operations in a strategic move to aid another employer in its dispute with other unions, this constitutes a "lockout" within the meaning of the collective bargaining agreement.

This court is not called upon either to accept or reject the views of the cited arbitrators on the facts before them. Indeed, it is not our function to pass on this issue on the facts before us, for such a determination is properly within the province of the arbitrator.

The duty of this court is only to decide whether the arbitration clause of the collective bargaining agreement in this case can be reasonably interpreted to cover the dispute. *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *Drake Bakeries v. Local 50, Bakery Workers*, 370 U.S. 254 (1962). We hold that there is a bona fide dispute over the interpretation of the agreement, and that Article IX clearly provides that such misunderstandings are to go to arbitration. Whether the particular conduct of the employer constitutes a "lockout" is one of the issues that the arbitrator has been empowered to decide.

The decision of the District Court is

Affirmed.

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[2] A similar definition of the term "lockout" was adopted in Local 50, Bakery Workers v. General Baking Co., 97 F. Supp. 73 (S.D. N.Y. 1951). There the union brought suit for damages under section 301 against the company for an alleged breach of a no lockout provision in a collective bargaining agreement. There was no contention before that court that the issue should be presented to an arbitrator. Furthermore, that case was decided many years before the Supreme Court espoused arbitration as the favored means of resolving disputes arising under collective bargaining agreements.

APPENDIX C

Judgment of the United States Court of Appeals for the Fourth Circuit

(Filed November 2, 1965)

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10082

Local Union No. 24, International Brotherhood of Electrical Workers, AFL-CIO, an unincorporated Association,

Appellee,

v.

The Hearst Corporation, Baltimore News American Division, a corporation,

Appellant.

Appeal from the United States District Court for the District of Maryland.

This cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

November 2, 1965

/s/ SIMON E. SOBELOFF,
United States Circuit Judge.

Filed
Nov. 2, 1965
MAURICE S. DEAN,
Clerk.

APPENDIX D

Opinion of the United States District Court for the District of Maryland

(Filed May 24, 1965)

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MARYLAND

Civil No. 16376

Local Union No. 24, International Brotherhood of Electrical Workers, AFL-CIO,

v.

The Hearst Corporation, Baltimore News American Division.

OPINION OF COURT

THOMSEN, Chief Judge

This is an action under section 301 of the Labor Management Relations Act, 29 U.S.C.A. 185, to secure enforcement of the arbitration provisions of the collective bargaining agreement between the parties. On April 20, 1965, defendant temporarily suspended publication of its newspaper and directed its employees not to report for work until further notice. Plaintiff contends that under the circumstances shown by the evidence the action of defendant in shutting down its operations and temporarily dismissing the electricians covered by the agreement between plaintiff and defendant was either a lockout or a layoff for a reason not permitted by the agreement, and constituted a breach of the agreement. Defendant disputes that contention. Plaintiff asserts and defendant denies that this dispute is a grievance or misunderstanding which is subject to arbitration under the provisions of the agreement.

Facts

Defendant prints and publishes the News-American, a daily newspaper in Baltimore City.[1] Defendant, together with the A. S. Abell Company (Abell), publisher of the Sunpapers, and the Daily Record Company, publisher of the Daily Record, as a multi-employer bargaining unit, jointly entered into collective bargaining agreements with locals of the Typographical Union and the Teamsters Union, respectively.[2] Defendant has a separate agreement with an independent union representing its reporters and others, whereas some of Abell's editorial staff, reporters, clerical workers and maintenance employees are represented by the Washington Newspaper Guild. The agreement under consideration in the instant case is a separate agreement between plaintiff and defendant alone, covering the few electricians employed by defendant to maintain and repair the electric and electronic equipment at defendant's plant.[3]

On April 20, 1965, defendant delivered the following letter or notice to each of its employees, including the electricians represented by plaintiff:

> "The Washington Newspaper Guild Local 35, AFL-CIO began a strike against the Baltimore Sun on April 17, 1965.
>
> "The Guild began and is now picketing the Sun plant.
>
> "The Sun and the News American have a joint contract (amongst others) with each of the following unions: Baltimore Typographical Union No. 12 and Truck Drivers and Helpers Local Union 355.

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[1] It is engaged in commerce within the meaning of 29 U.S.C.A. 142 and 151.

[2] See *A. S. Abell Co. v. Baltimore Typographical Union No. 12*, D. Md., 230 F. Supp. 962 (1964), affirmed 4 Cir. 338 F. 2d 190 (1964).

[3] Plaintiff is a labor organization within the meaning of 29 U.S.C.A. 152(5).

"The Sun employees covered by the two enumerated contracts have refused to cross the Guild picket lines and report for work to the Sun plant.

"The News American deems such refusal a violation of the joint contracts with the unions above named, and is a threat to the interest of the Sun and News American in bargaining on a group basis.

"Under these circumstances, you are hereby notified that the News American is suspending publication temporarily.

"You are directed not to report for work until further notice after the completion of your present shift.

"Your compensation ceases as of the last shift worked.

"Your employment with this newspaper has not been terminated. The purpose of this notice is to advise you of a period during which there will be no work to be performed by those employees who are not specifically requested to work.

"We regret the result of the union's actions. However, we hope that this unfortunate strike situation will be terminated in the near future.

"Sincerely,

"WILLIAM H. MILLS,
"General Manager."

At the same time defendant delivered to certain of its employees, including accounting and bookeeping personnel and the chief electrician, who although a member of plaintiff union was not covered by the collective bargaining agreement, an additional letter or notice which stated:

"Notwithstanding the general notification of publication suspension given our employees today, you are hereby instructed to continue on your regular employment schedule until such time as you are specifically notified of termination.

"Please report as usual on Wednesday, April 21st, and thereafter until further notice. * * *"

On April 22 Walter T. Skopp, plaintiff's business manager, notified Mills as follows:

"In accordance with the terms of our current collective bargaining agreement, Article IX and X thereof, IBEW Local Union No. 24 requests arbitration of your breach of our agreement by your unwarranted unilateral action in locking out our members because of dispute that Sun papers have with other labor organizations. In accordance with Article IX, Joseph Prestianni and Robert P. Arnold are appointed members of the Arbitration Board representing Local Union No. 24."

Mills replied by sending the following telegram to Skopp:

"Concerning your telegrams of April 21 and 22, it is clear that your Local has no labor dispute with News American. Our company had no work for members of your Local as a result of breach of contracts by Teamsters and ITU. As soon as work is available, your members will be promptly recalled. Since Article IX of the contract is not applicable, you have no basis for demanding arbitration as attempted in your telegram of April 22. Please acknowledge receipt of this message and withdrawal of your request for arbitration."

Plaintiff filed its complaint in the instant action the following day.

Plaintiff has no contract or dispute with Abell, and none of its members have picketed the Sunpapers' plant.

The Agreement

The collective bargaining agreement between plaintiff and defendant contains the following material provisions:

"ARTICLE IX — ARBITRATION

"It is agreed that in the event a grievance or misunderstanding arises out of and during the terms of

this agreement, as provided for herein, that cannot be composed by the Union and the Publisher within a reasonable time, and which constitutes a matter subject to review, such grievance shall be submitted to arbitration. For the purpose of each arbitration, there shall be established for the particular grievance an arbitration board consisting of two persons selected by the Publisher, two persons selected by the Union, and a fifth person to be the impartial chairman of such board, to be selected by these four. * * * There shall be no lockout by the Publisher or strike or stoppage of work by the employees pending the arbitration decision. It is agreed that any difference arising incident to negotiation of the terms of a new agreement are not covered by this section; the sole purpose of which is to make subject to arbitration grievances arising out of and during the terms of the agreement. * * *"

"ARTICLE X — STRIKES AND LOCKOUTS

"Section 1. There shall be no stoppage of work, either by strike or lockout during the term of this agreement or disputes over matters relating to this agreement. All such matters must be handled as stated in Article IX herein."

It will be noted that both sections are carelessly drawn; e.g., the word "terms" in the first sentence of Article IX is confusing, and the meaning of the material following the second "or" in the first sentence of Article X is not clear. The photographic copy of the agreement shows that the first sentence of Article X was a patchwork job.[4]

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[4] The agreement also contained the following provision:

"ARTICLE XII — GENERAL PROVISIONS

"Section 1. It is agreed that fruitless controversies must be avoided, and every effort made to promote harmonious relations. To accomplish this, both parties will in every instance give prompt attention to disputes and will, in good faith, settle all differences as provided by the terms of this contract. Under all circumstances, operations shall continue without interference or interruption until all differences are settled by conciliation or arbitration."

Discussion

Whether or not the company is bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the patries. *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 547 (1964); *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1962); *United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960). However, as Judge Sobeloff noted in *A. S. Abell Co. v. Baltimore Typographical Union No. 12*, 4 Cir., 338 F. 2d 190 (1964), the rules announced by the Supreme Court "unmistakenly encourage the resolution of disputes arising under collective bargaining agreements by arbitration rather than by the court, including issues, such as we have here, as to whether a particular dispute is arbitrable under the terms of the agreement. In Warrior & Gulf, the Supreme Court made this clear by stating: 'An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.' 363 U.S. at 582-583, 80 S. Ct. at 1353." 330 F. 2d at 193.[5]

Plaintiff argues that under the facts set out above defendant locked out its employees, including the electricians. On the other hand, defendant argues that "a lockout is an employer's withholding of work from his employees in order to gain a concession from them", *Local 50, etc. v. General Baking Co.*, S.D.N.Y., 97 F. Supp. 73 (1951); that before defendant sent the notice of April 20 to its employees it had no dispute with or grievance against plaintiff or any of the employees represented by plaintiff; that its labor dispute was with the Typographical and Teamsters Unions; and that it is clear under the facts and the law that the electricians were not locked out. Plaintiff's first point is

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[5] See also *C & P Tel. Co. v. Communication Workers of America*, D. Md., 239 F. Supp. 334 (1965), and *Maryland Tel. Union v. C & P Tel. Co.*, D. Md., 187 F. Supp. 101 (1960).

that the dispute as to whether or not there was a lockout of the electricians within the meaning of Article X of the agreement is arbitrable under the second sentence of Article X as well as under the more general provisions of Article IX.

Plaintiff also argues that even if defendant's action did not amount to a lockout of the electricians, nevertheless defendant's suspension of publication, shutting down its operations and temporarily dismissing its employees, including the electricians, was not only improper under the law but was a breach of the agreement between plaintiff and defendant. Since defendant contends that its suspension of publication was for a proper motive and permissible under the law and the agreement, plaintiff then argues that there is a dispute between the parties which amounts to "a grievance or misunderstanding arising out of and during the terms of this agreement * * * and which constitutes a matter subject to review"; and that under the provisions of Article IX, "such grievance shall be submitted to arbitration." Whether the asserted dispute is a grievance or misunderstanding which is required to be arbitrated by the provisions of Article IX requires a construction of the entire agreement in the light of the cases cited above.

In some of those cases the particular disputes involved were neither specifically included in the arbitration clause nor specifically excluded therefrom. It is not necessary to decide whether the arbitration clause in the agreement under consideration in this case is broader or less broad than similar clauses in other cases. It is different, and difficult to interpret with certainty.

The Court cannot say with positive assurance that the arbitration clause, Article IX, read along with Article X and the other provisions of the agreement, is not reasonably susceptible of an interpretation that covers the disputes asserted by plaintiff. The question whether such disputes are grievances or misunderstandings which are subject to arbitration is one of the questions which should be considered by the arbitrators.

The Court expresses no opinion on that question nor on the merits of any position taken by either side. All such questions are for the arbitrators, if they find the issues arbitrable under the agreement.

In its motion to dismiss, defendant argued that "[t]he allegations against defendant, if true, constitute an unfair labor practice within the exclusive jurisdiction of the National Labor Relations Board". Defendant did not brief or argue that point, but stated that it was not abandoned. Plaintiff admits that the alleged acts of defendant constitute an unfair labor practice; indeed, it has filed charges against defendant with the NLRB.[6] But it has been clearly held by the Supreme Court that the pre-emption doctrine of such cases as *San Diego Building Trades Council v. Carmon*, 359 U.S. 236 (1959), does not apply in cases under sec. 301 of the LMRA, 29 U.S.C.A. 185, to enforce arbitration under a collective bargaining agreement. *Smith v. Evening News Assn.*, 371 U.S. 195, at 197 (1962).

Counsel should agree within four days upon an appropriate decree requiring arbitration.

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[6] The Court has considered the allegations of the charge filed by plaintiff with the NLRB on May 18, but does not feel that it prevents the prosecution of this action.

APPENDIX E

Order of the United States District Court For The District of Maryland

(Filed May 28, 1965)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil No. 16376

Local Union No. 24, International Brotherhood of Electrical Workers, AFL-CIO,

v.

The Hearst Corporation, Baltimore News American Division.

ORDER

The above case having come on for hearing on May 6, 1965 and May 20, 1965, testimony having been presented; briefs having been filed; counsel for the parties having been heard; and the Court having filed an opinion herein on May 24, 1965; it is, this 28th day of May, 1965, by the United States District Court for the District of Maryland,

ORDERED

1. That Defendant's Motions to Dismiss be and the same are hereby denied.

2. That Defendant select two persons to act as its members of the arbitration board provided for in Article IX of the Agreement between the parties dated April 30, 1964 and notify Plaintiff of its selections on or before June 2, 1965.

3. That Plaintiff and Defendant submit to the aforesaid arbitration board the question of whether or not Defendant's suspension of publication on April 20, 1964 is arbitrable within the meaning of said Agreement.

4. That in the event such suspension is found to be arbitrable by an award, Plaintiff and Defendant submit to arbitration under Article IX of the aforesaid Agreement the questions of

(a) whether Plaintiff's members employed by Defendant are entitled to back compensation for the period during which they were unemployed by reason of Defendant's suspension of publication;

(b) the amount of back compensation, if any, due to each of said members of Plaintiff, and

(c) the amounts, if any, which shall be deducted from or credited against said back compensation;

5. That Defendant pay the costs of this action.

ROSZEL C. THOMSEN,
Chief Judge.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 966

THE HEARST CORPORATION, BALTIMORE NEWS AMERICAN DIVISION

Petitioner,

v.

LOCAL UNION NO. 24, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Respondent,

ON A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT LOCAL UNION NO. 24, IN OPPOSITION

THOMAS X. DUNN
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Respondent,

ON A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

QUESTION PRESENTED

Is the question of whether or not a lockout took place an arbitrable issue where, during the term of a collective bargaining agreement with the union providing that: "There shall be no stoppage of work either by strike or lockout during the term of this agreement" and that such disputes must be arbitrated, an employer locks out its employees because of an alleged dispute with other labor organizations engaged in a strike with another company.

ARGUMENT

Petitioner's main ground for urging the grant of its Petition for Certiorari is its contention that the decision of the court below conflicts with that of *Independent Petroleum Workers v. American Oil,* 324 F. 2d 903 (7 Cir., 1963). The latter case is distinguishable.

The arbitration provisions in *Petroleum Workers* were not nearly as broad as those contained in the Hearst-Local 24 collective bargaining agreement or in the 1960 Trilogy of cases on arbitration.[1] Indeed, the Petroleum Workers agreement specifically limited arbitration to three types of disputes.[2] That agreement also provided that matters re-

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[1] *United Steelworkers of America v. American Mfg. Co.,* 363 U.S. 564, 4 L.Ed 2d 1403, 80 SCT 1343 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation,* 363 U.S. 574, 4 L.Ed 2d 1409, 80 SC 1347 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.,* 363 U.C. 593, 4 L.Ed 2d 1424, 80 SCT 1358 (1960). See also *John Wiley & Sons, Inc., v. Livingston,* 373 U.S. 543, 11 L.Ed 2d 898, 84 SCT 909 (1964); *Atkinson v. Sinclair Refining Co.,* 370 U.S. 238, 8 L.Ed 2d 462, 82 SCT 1318 (1962); *A. S. Abell Co. v. Baltimore Typographical Union #12,* 338 F. 2d 190 (4 CCA, 1964).

[2] A. Questions which may be referred to arbitration shall be limited to:

1. Questions directly involving or arising from applications, interpretations or alleged violations of the terms of this agreement.

2. Questions directly involving or arising from applications of the terms of arbitration awards and written agreements not incorporated in this Agreement.

3. Questions of applications or interpretations of or alleged noncompliance with past policies, practices, customs or usages relative to working conditions, and grievances arising from:

(a) the modification by the Company of any of said policies, practices, customs and usages, or

(b) the discontinuance by the Company of any of said policies, practices, customs and usages, or

lating to rates of pay, hours of employment and other conditions of employment not covered in the agreement would be subject to bargaining by the employer; but on these subjects the employer could refuse to arbitrate, in which event the no strike clause was suspendable. *Petroleum Workers* involved the right of the employer to subcontract work and testimony showed that such a clause had been sought by the union for many years and on each occasion that proposals limiting the right of the employer on contract work out had been rejected. Moreover, in *Petroleum Workers* there was involved a question of collateral estoppel because in an earlier decision between the same parties, involving the same type of dispute and the same arbitration provisions, a decision against arbitrability had been rendered and had not been appealed. In the *Warrior & Gulf* case, *supra,* which also involved the right of the employer to subcontract, the arbitration provisions were limited only by a general restriction to "matters***strictly a function of management."

On the other hand, in the instant case, the arbitration provisions are so broad that the parties felt it necessary to exclude from the arbitration process *"any difference arising incident to negotiation of the terms of a new agreement . . ."*[3] (App. 8, Article IX). Article X of the collective bargaining agreement between the parties (App. 9) specifically requires that the very dispute involved here shall be the subject of arbitration by providing that "there shall be no stoppage of work, either by *strike or lockout* during the term of this agreement or disputes over matters relating to this agreement." All such matters must be

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(c) the establishment by the Company of new policies, practices, customs or usages during the term of this Agreement. 52 LRRM 2679

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[3] The record references are to the Appendix to Appellants' Brief in the U. S. Court of Appeals for the Fourth Circuit, copies of which have been filed herein by Petitioner.

handled in accordance with the arbitration provisions. Under Article XII (App. 9), it has been agreed that "fruitless controversies must be avoided"; that both parties will "settle all differences as provided by the terms of this contract"; and that, "under all circumstances, operations shall continue without interference or interruption until all differences are settled by conciliation or arbitration."

In *Humble Oil Co. v. Industrial Workers Union,* 337 F. 2d 321 (5 Cir., 1964), the arbitration provision there involved, although narrower than in the instant case, was found by the Court to require arbitration. The employer attempted to rely on the *Petroleum Workers* case, *supra,* but its contentions were rejected by the court as follows:

> "That case is readily distinguishable on a number of grounds. First and foremost, the contract there involved did not contain an unequivocal no-strike provision, as here, but the no-strike clause was specifically suspendable on a refusal to arbitrate. Second, in that case arbitrable grievances related to 'Questions directly involving or arising from applications, interpretations or alleged violations of the terms of this agreement.' 324 F. 2d at 905, 54 LRRM 2598. That is much narrower than 'a good faith claim by one party that the other party has violated a written provision of this agreement.' (Article 251, quoted supra.) The word 'alleged' in the Petroleum Workers case modified only 'violations,' while under Article 251 of the present contract the 'good faith claim' might relate to the interpretation of the written provision of the contract. There are other differences." [57 LRRM 2114]

Petitioner has insisted throughout the litigation of this case that its action in locking out Respondent's members is not a lockout under the terms of the agreement. The Court below properly found that this was a matter for the arbitrator to decide on the merits. Petitioner also has insisted that no dispute existed between it and Respondent

prior to the Respondent's decision to lock out the members of Respondent. The Court also properly found that once objection was made by Respondent to the lockout, a bona fide dispute existed and that dispute became the subject of arbitration.

A secondary reason for the grant of the Petition asserted by Petitioner is that the Court of Appeals for the Fourth Circuit has adopted a view, in a case in no way connected with the instant one, that would seem contrary to the decisions of this Court. Petitioner thus suggests that in the case of *A. S. Abell Co. v. Baltimore Typographical Union No. 12, supra.*, the Fourth Circuit wrongfully decided that the question of arbitrability should be decided by the arbitrator rather than by the Court. That legal question is not present here. The Court below said:

> *"We hold that there is a bona fide dispute over the interpretation of the agreement, and that Article IX clearly provides that such misunderstandings are to go to arbitration. Whether the particular conduct of the employer constitutes a 'lockout' is one of the issues that the arbitrator has been empowered to decide."* [Emphasis supplied.]

Respectfully submitted,

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